YONG TENG FUN & ANOR v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
TENGKU MAIMUN TUAN MAT JCA
VARGHESE GEORGE JCA
[CRIMINAL APPEALS NO: Q-05-248-10-2012 & Q-05(S)-266-10-2012]
31 DECEMBER 2014

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Whether appellants caused death of deceased – Self defence – Whether applicable – Both appellants had equal liability – Whether sentences imposed ought to be the same – Penal Code, ss. 34, 304(a)*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Finding of facts by trial judge – Whether appellate interference warranted – Whether conviction and sentence safe*

A quarrel arose between the deceased and the second appellant. The deceased allegedly used a broomstick to hit the second appellant, causing the second appellant to fall and injure his forehead. The first appellant then hit the deceased with a plastic chair and proceeded to his vehicle to bring the second appellant to the hospital for treatment. While the appellants were seated in the car, the deceased rushed towards the vehicle and smashed its windscreen with a broomstick. The first appellant reacted by taking a rattan from underneath the seat of the vehicle and hit the deceased twice on his forehead. After the commotion, the deceased went to PW8's house. According to PW8, the deceased, after cleaning up his wounds and having a cigarette, suddenly rushed towards the gate, knocked his head against the drain and fell unconscious. PW8 went on to explain that the deceased had dived into the drain and had knocked against the edge of the drain. The deceased was pronounced dead upon being taken to the hospital. The pathologist confirmed that the cause of death was due to intracranial bleeding with fracture of skull due to blunt head injuries. Subsequently, both the appellants were charged under s. 302 of the Penal Code ('Code'). After hearing the defence put forward by the appellants, primarily that of self-defence and alternatively grave and sudden provocation, the High Court Judge ('HCJ') found both the appellants guilty of culpable homicide not amounting to murder under s. 304(a) of the Code. The first appellant was sentenced to nine years imprisonment and the second appellant was sentenced to seven years imprisonment with effect from the date of arrest. Aggrieved, both appellants appealed against their convictions and sentences. The appellants contended that the death of the deceased was not caused by the appellants, as it was the deceased who had dived into the drain and injured himself. On the other

hand, the prosecution appealed against the sentence imposed by the trial judge on the ground that it was manifestly low considering that the maximum sentence provided by law for such offence was 30 years. Further, the prosecution also argued that the sentence imposed on the appellants ought to be the same as both appellants bear equal liability as they were charged together under s. 34 of the Code. The issues that arose for determination, *inter alia* were (i) whether the appellants had caused the death of the deceased; and (ii) whether self defence was applicable.

Held (dismissing both appeals; affirming conviction and sentence)
Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) The findings of the HCJ was not wrong. It involved a finding of fact which the appellate tribunal would loathe to interfere. A finding of fact would not be subjected to any interference by an appellate tribunal unless there were substantial and compelling reasons for disregarding the findings. The findings of the HCJ were made based on the testimonies of the prosecution witnesses. As an appellate court, the findings of the trial judge would not be reversed in the absence of any palpable and overriding error which affected the trial judge's assessment of facts. (para 16)

(2) In considering the defence of self defence and grave and sudden provocation, the trial judge came to a finding that there was no apprehension on the part of the appellants that the deceased might cause death or grievous hurt to both of them based on the weapon used, the manner of using it, the nature of the assault and other surrounding circumstances. The deceased was said to be armed with a broomstick or a stick. At that point of time, as both the appellants were in the vehicle, there was no reason why the appellants could have not just left the place. (paras 17, 43, 47 & 48)

(3) A court would not alter a sentence merely because it had passed a different sentence. The imposition of sentence was very much an exercise of discretion by the trial judge. The concept of judicial discretion involved a right to choose between more than one possible course of action upon which there was room for reasonable people to hold differing views as to which was to be preferred. Therefore, sentence does vary. (paras 52 & 55)

(4) The trial judge had not breached any of the guiding principles of sentencing and neither was the sentence imposed wrong in law. Although liability under s. 34 of the Code was equal, the HCJ was entitled to impose different sentences having considered the facts and

circumstances of the case and also the mitigating factors that had been put forward. As such, the court would not willy-nilly interfere and substitute its own sentence for the one imposed by the trial court. (paras 55 & 57)

Bahasa Malaysia *Translation Of Headnotes*

Satu pertengkaran telah timbul antara si mati dan perayu kedua. Si mati didakwa telah menggunakan batang penyapu untuk memukul perayu kedua yang menyebabkan perayu kedua jatuh dan cedera pada dahinya. Perayu pertama kemudiannya telah memukul si mati dengan kerusi plastik dan menuju ke keretanya untuk membawa perayu kedua ke hospital bagi mendapatkan rawatan. Apabila perayu-perayu berada di dalam kereta, si mati bergegas ke arah kenderaan tersebut dan memecahkan cermin kereta dengan batang penyapu. Perayu pertama membalas dengan mengambil rotan dari bawah tempat duduk keretanya dan memukul si mati sebanyak dua kali pada dahinya. Selepas kekecohan tersebut, si mati telah pergi ke rumah PW8. Menurut PW8, selepas membersihkan luka-lukanya dan merokok, Si mati tiba-tiba meluru ke arah pintu dan mengetuk kepalanya pada longkang dan jatuh tidak sedar diri. PW8 selanjutnya menjelaskan bahawa si mati telah terjun ke dalam longkang dan terhantuk pada longkang. Si mati disahkan meninggal dunia apabila dibawa ke hospital. Pakar patologi mengesahkan bahawa punca kematian adalah disebabkan oleh 'intracranial bleeding with fracture of skull due to blunt head injuries'. Berikutan itu, kedua-dua perayu telah dipertuduh di bawah s. 302 Kanun Keseksaan ('KK'). Selepas mendengar pembelaan yang dikemukakan oleh perayu, pada asasnya, pembelaan mempertahankan diri dan secara alternatif bangkitan marah besar dan mengejut, Hakim Mahkamah Tinggi ('HMT') telah mendapati kedua-dua perayu bersalah membunuh tanpa niat bukan berjumlah pembunuhan di bawah s. 304(a) KK. Perayu pertama dijatuhkan hukuman sembilan tahun penjara dan perayu kedua dijatuhkan hukuman tujuh tahun penjara berkuatkuasa dari tarikh tangkap. Terkilan, kedua-dua perayu merayu terhadap sabitan dan hukuman. Atas rayuan, kedua-dua perayu menghujahkan bahawa kematian si mati bukan disebabkan oleh perayu-perayu, tetapi, ia adalah si mati yang melompat ke dalam longkang dan mencederakan dirinya sendiri. Sebaliknya, pihak pendakwaan membuat rayuan terhadap hukuman yang dikenakan oleh hakim bicara atas alasan bahawa hukuman yang dijatuhkan adalah terlalu ringan memandangkan hukuman maksima yang diperuntukkan oleh undang-undang bagi kesalahan sebegitu adalah 30 tahun. Di samping itu, pihak pendakwaan juga menghujahkan bahawa hukuman yang dikenakan ke atas perayu-perayu sepatutnya sama di atas sebab kedua-dua perayu menanggung liabiliti yang serupa memandangkan mereka didakwa bersama-sama di bawah s. 34 KK. Isu-isu yang timbul untuk pemutusan, antara lain, adalah (i) sama ada perayu-perayu telah menyebabkan kematian si mati; dan (ii) sama ada pembelaan mempertahankan diri kerana terpakai.

Diputuskan (menolak kedua-dua rayuan; mengesahkan sabitan dan hukuman)

Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Tiada kekhilafan pada dapatan HMT. Ia melibatkan suatu dapatan fakta yang tribunal rayuan akan keberatan untuk campur tangan. Dapatan fakta tidak akan tertakluk kepada sebarang gangguan oleh suatu tribunal rayuan melainkan jika ada sebab-sebab yang mendesak dan kukuh untuk mengabaikan dapatan tersebut. Dapatan HMT dibuat berdasarkan keterangan saksi-saksi pendakwaan. Sebagai mahkamah rayuan, dapatan hakim bicara tidak akan diakas jika tiada apa-apa kekhilafan yang nyata dan penting yang memberi kesan kepada penilaian HMT terhadap fakta.

(2) Dalam menimbangkan pembelaan mempertahankan diri dan bangkitan marah besar dan mengejut, HMT telah membuat dapatan bahawa tiada kebimbangan yang munasabah pada pihak perayu-perayu bahawa si mati akan menyebabkan kematian atau cedera serius terhadap mereka berdasarkan senjata yang digunakan, cara penggunaannya, sifat serangan dan keadaan sekelilingnya. Si mati dikatakan bersenjata dengan batang penyapu atau kayu. Pada masa tersebut, kedua perayu-perayu masih berada di dalam kereta, tiada sebab mengapa perayu-perayu tidak boleh meninggalkan sahaja tempat tersebut.

(3) Mahkamah tidak akan mengubah hukuman semata-mata kerana telah menjatuhkan suatu hukuman yang lain. Pengenaan hukuman adalah satu amalan budi bicara oleh hakim bicara. Konsep budi bicara kehakiman melibatkan hak untuk memilih antara lebih daripada satu penjalanan tindakan di mana terdapat ruang untuk seseorang yang munasabah untuk mempunyai pandangan yang berbeza tentang yang mana akan diutamakan. Oleh itu, hukuman boleh dibezakan.

(4) Hakim bicara telah tidak melanggar mana-mana prinsip panduan hukuman dan hukuman yang dikenakan adalah tidak salah dari segi undang-undang. Walaupun liabiliti di bawah s. 34 KK adalah sama, HMT berhak untuk mengenakan hukuman yang berbeza dengan mengambil kira fakta-fakta dan hal keadaan kes dan juga faktor-faktor peringanan yang telah dikemukakan. Oleh itu, mahkamah rayuan tidak akan mengganggu dan menggantikan hukuman yang dikenakan oleh mahkamah bicara.

Case(s) referred to:

Ang Chai Seng v. PP [2000] 1 CLJ 213 CA ***(refd)***
Annantan Subramaniam v. PP [2007] 8 CLJ 1 HC ***(refd)***
Bear Island Foundation v. Attorney General for Ontario [1991] 83 DLR (4th) 381 ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***

PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
Soong Hee Sin v. PP [2001] 2 SLR 253 ***(refd)***
Sheo Swarup v. King Emperor AIR [1934] PC 227 ***(refd)***

Legislation referred to:
Penal Code, ss. 34, 99, 100, 302, 304(a)

(Criminal Appeal No: Q-05-248-10-2012)
For the appellants - Ranbir Singh Singham (Eric Lau with him); M/s Ranbir S Singh & Co
For the respondent - Andi Razalijaya, DPP

(Criminal Appeal No: Q-05(S)-266-10-2012)
For the appellant - Andi Razalijaya; DPP
For the respondent - Ranbir Singh Singham (Eric Lau with him); M/s Ranbir S Singh & Co

[Appeal from High Court, Bintulu; Criminal Trial No: BTU-45-6-2009]

Reported by Sandra Gabriel

JUDGMENT

Balia Yusof Wahi JCA:

Background facts

[1] These two appeals were heard together. In Appeal No. Q-05-248-10-2012, the two appellants Yong Teng Fun (first appellant) and Jong Soon Kwong (second appellant) are appealing against their conviction and sentence under s. 304(a) of the Penal Code.

[2] In Appeal No. Q-05(S)-266-10-2012 the Public Prosecutor is appealing against the sentence of nine years imprisonment on the first appellant and seven years imprisonment on the second appellant on the ground that the sentence imposed by the High Court is manifestly inadequate.

[3] In respect of Appeal No. Q-05-248-10-2012, the appellants' conviction had been attacked on the following two grounds:

(a) whether the appellants caused the death of the deceased, and

(b) whether self defence is applicable

[4] Without going into the details of the evidence adduced by the prosecution, suffice it to state that there was a quarrel between the deceased and the second appellant (who was the second accused in the court below). The deceased was alleged to have used a broomstick to hit the second appellant, causing the second appellant to fall and injure his forehead. The first appellant (the first accused in the court below) hit the deceased with a plastic chair as testified by PW7 and PW1. The first appellant then proceeded to his vehicle (a Toyota Land Cruiser) intending to bring the

second appellant to the hospital for treatment of the second appellant's forehead injury. While both the appellants were seated in the vehicle together with the first appellant's son, PW7 came and tried to explain to the first appellant that what had happened between the deceased and the second appellant was just a misunderstanding and that the deceased had accidently hit the second appellant. The first appellant refused to believe PW7's explanation. At this juncture, the deceased rushed towards the Land Cruiser and smashed its windscreen with a broomstick. The first appellant reacted by taking a rattan (exh. P4) from underneath the seat of the Land Cruiser and hit the deceased twice on his left forehead.

[5] According to PW10, the second appellant also came out of the Land Cruiser and "the three of them had a fight". PW1 and PW7 also stated that the first appellant's son also joined the fight. The fighting according PW1 only stopped after she hugged her husband (the deceased). The first and the second appellants together with the first appellant's son left the scene in the Land Cruiser.

[6] Having rested for a while, the deceased went to the kitchen of PW8's house to clean the wounds on his left ear and applied some medication on the injuries. He also had a cigarette thereafter. Suddenly, according to PW8, the deceased was seen rushing towards the gate and knocked his head against the drain and he fell unconscious. Upon being questioned by the court, PW8 explained that the deceased dived into the drain and knocked against the edge of the drain.

[7] The deceased was then taken to the Bintulu Hospital and upon admission at the Emergency Unit, he was pronounced dead. PW14 testified that the deceased could have died even before arrival at the hospital.

[8] The two appellants were charged under s. 302 of the Penal Code and were ordered to enter their defence on the charge.

[9] After hearing the defence case, with the two appellants giving evidence on oath and calling three other defence witnesses, the learned High Court Judge found the two appellants guilty of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. The first appellant was sentenced to nine years imprisonment with effect from the date of arrest while the second appellant was sentenced to seven years with effect from the date of his arrest.

The Appeal

[10] Before us, learned counsel for the appellants submitted that the death of the deceased was not caused by the appellants. It was "self inflicted", to borrow the words of the learned counsel. The deceased dived into the drain and injured himself. The evidence of PW8 supports this contention. The hairline fracture on the deceased's skull could have been caused by the fall

as agreed to by PW12, the pathologist upon being cross-examined by the appellants' counsel. The deceased only became unconscious after the fall into the drain. In the light of the two possibilities, it was submitted that an inference more favourable to the appellants ought to have been drawn in that the injury was not caused by the appellants' act of hitting the deceased with a rattan and a plastic chair.

[11] It was never disputed by the appellants that they were involved in the fight with the deceased and that he was hit with the rattan. The first appellant said he merely used the plastic chair to protect and defend himself from the attacks by the deceased. The second appellant admitted that he too, came out of the Land Cruiser with a rattan but denied hitting the deceased with the same. This happened when the deceased had smashed the windscreen of the Land Cruiser.

[12] The medical evidence proffered by PW12, the pathologist and exh. P40, the autopsy report revealed the following injuries sustained by the deceased:

(1) Laceration at left upper pinna measuring 2.5cm deep and gaping.

(2) Laceration at between ring and index finger of right hand measuring about 1.5cm long and 0.5cm deep and 0.3cm wide.

(3) Linear abrasion at left anterior neck measuring 7.5cm long 0.8cm wide.

(4) Linear abrasion at lateral to the right eyebrow measuring 7cm long and 0.5cm wide.

(5) Abrasion at anterior left temporal area measuring 1cm long and 0.5cm wide.

(6) Linear abrasion lateral to the left abdomen measuring 12cm long and 1cm wide.

(7) Multiple small abrasion and bruises at the both anterior lower leg.

[13] The cause of death was stated to be intra cranial bleeding with fracture of skull due to blunt head injuries. The chance of survival of a person who sustained the aforesaid injuries according to PW12, is slim.

[14] In response to cross-examination by the appellants' counsel, PW12 testified that the aforesaid head injuries were more likely due to the hit with the rattan rather than a fall from a standing position. Still in cross-examination, PW12 had explained, "In my opinion it is more likely due to the rattan due to the strong force because this deceased has fracture of skull - hairline – and subdural haemorrhage rather than limited to the haematoma below the skin at the left temporal area and anterior parietal area".

[15] The learned trial judge had made a finding that:

> The irresistible inference, therefore, was that notwithstanding the incident whereby the Deceased appeared to have 'rushed' towards the drain at the side of PW8's drive-way and fell after urinating at the right hand side of the gate, the said injuries inflicted by the use of Ex. P.5 (the rattan sticks) on the Deceased by the accused persons were sufficient in the ordinary course of nature to cause death …
>
> The finding was based on a consideration of the evidence adduced by the prosecution *vis-à-vis* the essential elements of the offence as per charge including the element, that the accused persons, in furtherance of a common intention, "caused the injuries with the intention of causing bodily injuries and such bodily injuries intended and inflicted are sufficient in the ordinary course of nature to cause death".

(see p. 8 supplementary record of appeal)

[16] We see no wrong with the finding made by the learned trial judge. It involved a finding of fact which this appellate tribunal will loathe to interfere. A finding of fact will not be subject to any interference by an appellate tribunal unless there are substantial and compelling reasons for disagreeing with the finding. (see *Herchun Singh & Ors v. Public Prosecutor* [1969 1 LNS 52; [1969] 2 MLJ 209, *Sheo Swarup v. King Emperor* AIR [1934] PC 227).

[17] The finding of the learned High Court Judge was made based on the testimonies of the prosecution witnesses primarily PW1, PW7, PW8 and PW10 on the altercation between the deceased and the two appellants. Further, the evidence of PW12 fully supports the finding that the injuries suffered by the deceased could not be "self inflicted" as suggested by the appellants. The finding was made after the judge having the advantage of hearing and seeing the witnesses. Such finding is entitled to great respect. As an appellate court, we should not reverse that finding of the trial judge in the absence of palpable and overriding error which affected His Lordship's assessment of the facts. (see *Lee Ah Seng & Anor v. Public Prosecutor* [2007] 5 CLJ 1). We find no such palpable and overriding error on the part of the learned trial judge in his assessment of the facts before him.

[18] We found no merit in the appeal on this ground.

[19] Moving on to the second ground of appeal, it was submitted on behalf of the appellants that they were exercising their right of private defence over their own bodies and property. The property being the Toyota Land Cruiser belonging to the first appellant.

[20] The appellants further contended that the evidence of the prosecution witnesses lent credence to the stand they took in raising the said defence namely, the evidence of PW8, PW10 and PW14.

[21] In his defence, the first appellant testified that on 5 June 2009 after having dinner at Lu Fa Café, he, his eldest son Michael Yong Tein Chin and one, Ah Kwai (PW10 – Ting Pik Kai) went to Eagle Karaoke, and had some beer. While at Eagle Karaoke, the first appellant received a phone call from Ting Pek Khing (PW8). PW8 told him that there is a quarrel at his house and asked him to come to "advise our friend not to quarrel". Together with his son and PW10, the first appellant proceeded to PW8's house. On his way there, he received another call from PW8 asking him to come as soon as possible.

[22] Upon arrival, the second appellant who was there, told the first appellant "that they were still quarrelling". The first appellant further testified that he heard Ah Kwai informing the second appellant that the deceased assaulted him. The first appellant himself did not see the deceased assaulting Ah Kwai.

[23] Thereafter, according to the first appellant, the second appellant went over to the deceased and was punched on his left cheek. The deceased got hold of a stick and hit the second appellant's upper right forehead. The first appellant then took a plastic chair to defend himself because he was scared that the deceased will assault him too.

[24] Seeing that the second appellant was bleeding, he then took a piece of cloth from the floor and bandaged the second appellant's head and lifted the second appellant and brought him to his vehicle (Toyota Land Cruiser) to bring him to the hospital.

[25] The first appellant testified further, that while he was taking the second appellant to the vehicle, the deceased hit him with a stick. As he was about to start the vehicle, the deceased came over to the front of the vehicle and asked him to come down and smashed the windscreen of the vehicle with a stick. The deceased then dragged him out and hit him on his forearm with a stick. In retaliation, the first appellant said he went back to the vehicle and took out a rattan from below the driver's seat and hit the deceased with it. The deceased, was said to have moved backward and knelt down, lost his balance and fell to the ground. The first and second appellants then left for the hospital. Later, at the hospital the first appellant was informed by PW1 that the deceased had jumped into the drain and committed suicide.

[26] The second appellant in his evidence went on to state that on the same day at about 2pm together with PW7 and the deceased they went to PW8's house for a barbecue in conjunction with the Gawai festival. They then started drinking beer. Later on, the three of them went to 'Shanghai Karaoke' where they had more beer and met one, Ah Wong who was alleged to be having an affair with the second appellant's wife. A quarrel then started among the four of them – PW7, the deceased, the second appellant and Ah Wong.

[27] According to the second appellant, during the quarrel, Ah Wong told him that he would bring some gangsters from Sibu to assault them. Thereafter, Ah Wong left and the three of them returned to PW8's house. At PW8's house, the deceased was still very angry, saying he was not scared of the gangsters whom Ah Wong wanted to bring from Sibu.

[28] After the arrival of the first appellant, his son and PW10 at PW8's house, PW10 approached the deceased and advised him to cool down. According to the second appellant the deceased was very angry and wanted to take action against the Sibu gangsters. The second appellant then saw the deceased punching PW10 on the left cheek. The second appellant then stepped in and approached the deceased informing him that PW10 was his good friend.

[29] He asked the deceased to cool down, but the deceased punched him on his left forehead and the deceased then took a 'wooden stick' and hit him on his right forehead, causing him to fall to the ground. His forehead was bleeding.

[30] The first appellant came and lifted him from the ground and brought him to the vehicle to go to the hospital. While they were in the vehicle, the deceased came over and smashed the windscreen with a stick. The deceased then opened the door on the driver's side and dragged the first appellant out. The deceased was holding a wooden stick, and the first appellant had nothing in his hands.

[31] The second appellant further testified that the deceased hit the first appellant with a stick and thereafter the first appellant went back to his vehicle and took out a rattan. Both of them had a fight and the deceased was seen in a squatting position and then he fell to the ground.

[32] The appellants also called two other witnesses in support of their defence, DW2, Dr Aruchamy Ramalingam and DW4, Dr. Maria Shelyn Wong.

[33] DW4 was called by the defence to ascertain the cause of the second appellant's forehead injury. She was cross-examined by the prosecution as to whether the second appellant's forehead injury was consistent with him falling "on a cement floor" or "on the sharp edge of a water tank".

[34] DW4 opined that such a fall would have to be "from high and would unlikely if merely falling very fast from a standing position". This was in respect of the second appellant having been said to have fallen on a cement floor. Concerning the falling on the sharp edge of a water tank, her answer was a plain "No" and further opined that if the second appellant falls very fast (a heavy fall, so to say) she replied "it may cause the right forehead wound, but it does not explain the pattern of the skull fracture". One would

recall that the second appellant suffered a depressed frontal wound fracture of the skull. In essence, DW4's evidence suggests that the injury on the second appellant's forehead could not be a result of him falling on the cement floor or hitting the edge of the water tank, but must have been caused by the deceased's assault.

[35] DW2, Dr. Aruchamy Ramalingam treated the first appellant who, according to him sustained a deep cut wound over the left elbow measuring about 8cm. Resulting from the cut wound, the first appellant also suffered an injury to the ulnar nerve, fracture medial condyle and fracture olecranon. As to what caused the injuries, DW4 testified that they were caused by a sharp object.

[36] The defence put forward was primarily that of self defence and alternatively, grave and sudden provocation.

[37] In considering the defence put up by the appellants, the learned trial judge had revisited among others, the evidence of PW1 and PW7 in the light of the defence evidence. PW7 was the brother of the deceased while PW1 was the deceased's wife.

[38] Having done so, the learned trial judge came to a finding that "in all probability it was actually the deceased who caused the second appellant's serious forehead injury, and that he inflicted such injury presumably due to the second appellant's attempt to calm him down after he (the deceased) had earlier on punched PW10 on his face; presumably angered by the deceased's action, the first appellant then tried to hit the deceased with a plastic chair but the deceased managed to avoid it".

(see p. 30 of 40 supplementary record of appeal).

[39] Proceeding further, the learned trial judge also considered the alternative submission of counsel that "… the facts of the case show that there was no premeditation on the part of both the accuseds. The provocation came in the form of the deceased assaulting and causing serious injury to the second appellant and then subsequently causing damage to the property of the first appellant being the Toyota Land Cruiser".

[40] Having considered the totality of the evidence led by the prosecution and re-evaluating the same against the defence evidence, His Lordship concluded:

> The prevailing circumstances at the material time do appear to have provoked the 1st and 2nd accuseds in assaulting the deceased or that their assaulting the deceased arose out of a sudden fight. Based on the overall evidence and on the applicable legal principles, it would appear proper the invocation of the defence of sudden flight or the defence based on grave and sudden provocation as provided for under Exceptions 4 or 1 to s. 300 of the Penal Code. (see page 37 of 40 Supplementary Appeal Record)

[41] The learned trial judge had found the evidence of the two appellants in their defence had cast serious doubt on the accuracy and credibility on material aspects, in the evidence of PW1 and PW7 as to the forehead injury on the second appellant being accidentally caused by the deceased. It was the deceased who had been behaving aggressively starting from the quarrel and punching PW10 on his face and the second appellant intervening to calm him down.

[42] This conclusion arrived at by the learned trial judge is clearly supported by the evidence adduced and this court will loath to interfere. It was a finding made upon a consideration of the whole evidence at the end of the defence case.

[43] In rejecting self defence, the learned trial judge had agreed with the learned Deputy Public Prosecutor that from the overall facts and circumstances, there was no apprehension on the part of the appellants that the deceased may cause death or grievous hurt to both of them after the deceased had smashed the windscreen of the vehicle they were in.

[44] While we may agree that the learned trial judge merely dealt with this issue very briefly in his grounds of judgement, suffice it to say that His Lordship was right is agreeing with the learned Deputy Public Prosecutor on the applicability of the s. 100 of the Penal Code which provides:

> **Section 100. When the right of private defence of the body extends to causing death.**
>
> The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the following descriptions:
>
> (a) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
>
> (b) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
>
> (c) an assault with the intention of committing rape;
>
> (d) an assault with the intention of gratifying unnatural lust;
>
> (e) an assault with the intention of kidnapping or abducting;
>
> (f) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

[45] *Ratanlal on Law of Crimes*, states that s. 100 of the Penal Code must be subject to the provision of s. 99 of the same and four cardinal conditions must have existed before the taking of the life of a person is justified on the plea of self defence. The four conditions are:

(1) the accused must be free from fault in bringing about the encounter, A

(2) there must be present an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity,

(3) there must be no safe or reasonable mode of escape by retreat, and B

(4) there must have been a necessity for taking life.

[46] Section 99 of the Penal Code provides a limitation to the right of private defence. If an accused person has time to have recourse to seek the protection of a public authority or inflicts more harm than necessary for the purpose of defending his person, he cannot avail himself of the protection C provided by the defence.

[47] Based on the "overall facts and circumstances" as the learned trial judge had put it, we are not in a position to disagree with the finding made. We asked the question and looked at the photograph of the vehicle to see D whether it was smashed. The photograph is not clear but certainly the front windscreen was not broken or smashed as the witnesses say. Perhaps, it was the front window screen that was smashed. The deceased was said to be armed with a broomstick or a stick. The second appellant mentioned that the deceased used a broomstick to hit him on his forehead and when the first appellant was hit, the deceased was also said to be using a 'wooden stick'. E At that point of time, both of the appellants were in the vehicle and there was no reason they could have not just left the place and head for the hospital. Further, as the story unfold, after being dragged out of the vehicle, the first appellant came back and got hold of a rattan from under the seat of the vehicle and went for the deceased with the second appellant following suit. F

[48] Whether the apprehension of death or grievous hurt was reasonable or not is a question of fact and depend on the circumstances of the case. The weapon used, the manner of using it, the nature of the assault and other surrounding circumstances are all matters that need to be considered by the G trial judge. Based on this factual matrix, can the assault by the deceased may reasonably cause the apprehension of death or that grievous hurt will otherwise be the consequence of such assault? Due respect must be given to the learned trial judge as a trier of facts and we will be slow to interfere with His Lordship's findings. In the absence of any palpable and overriding error H which affected His Lordship's assessment of the facts this court will always be reluctant to interfere. (see *Lee Ah Seng & Anor v. Public Prosecutor* [2007] 6 MLJ 1, *Bear Island Foundation v. Attorney General for Ontario* [1991] 83 DLR (4th 381). Similarly, unless there are substantial and compelling reasons for disagreeing with the finding, this court will be slow to interfere. We find no such palpable and overriding error on the part of learned trial judge in his I assessment of the facts before him and no substantial and compelling reason to disagree.

[49] For the aforesaid reasons, we found no merit in the appellants' appeal and the appeal is hereby dismissed.

The Prosecutor's Appeal

[50] In appealing against the sentence passed by the learned High Court Judge, the learned Deputy Public Prosecutor was of the view that the sentence is manifestly low considering that the maximum sentence provided by law is 30 years. Further, it was submitted that the sentence against both the appellants ought to be the same. The learned trial judge had imposed a sentence of nine years imprisonment against the first appellant and seven years against the second appellant. It was submitted that both the appellants bear equal liability as they were charged together under s. 34 of the Penal Code. Both should be equally liable and suffer the same sentence. The learned Deputy Public Prosecutor had suggested that a sentence of imprisonment for a period of between 20 to 24 years would be appropriate in the circumstances of the case.

[51] Learned counsel for the appellants on the other hand submitted that the sentence imposed is excessive and further submitted that the sentence should be for the period that the appellants had served before bail was allowed by the court. We were told that the appellants had already served a sentence of imprisonment for a period of three years, three months and seven days by then.

[52] At the outset, it must be noted that the court will not alter a sentence merely because it might have passed a different sentence (*Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256, *Ang Chai Seng v. PP* [2000] 1 CLJ 213).

[53] In *Bhandulananda Jayatilake v. Public Prosecutor* [1981] 1 LNS 139; [1982] 1 MLJ 83 the Federal Court at p. 84 said:

> … this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference. For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion.

[54] Jeffrey Tan J (as he then was) in *Annantan Subramaniam v. PP* [2007] 8 CLJ 1 referring to an article, Civil and *Criminal Appeals in Malaysia* by Tan Kee Heng at pp. 191-192 commenting on appellate interference with the sentence imposed by the trial court, had listed out the following circumstances where interference may be justified:

(a) The sentence imposed by the trial court was manifestly excessive or inadequate.

(b) There is a manifest error either in law or in considering the facts and circumstances of the case.

(c) The sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

(d) The trial court has given undue weight to some of the evidence.

(e) The trial court, in fixing the sentence, had failed to adequately consider all the relevant factors either for or against the offender.

(f) The sentence was wrong in law.

(g) The unsatisfactory features of the proceedings in the lower court.

(h) The charge has been hanging over the accused's head for a considerable period.

(i) Justice does not appear to have been done.

[55] The imposition of sentence is very much an exercise of discretion by the trial judge. The concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing views as to which is to be preferred. Different judges may have different views and may sometimes reach different conclusion on the same set of facts. That is inevitable. Some may be very conscientious and may have different set of sentences while others equally conscientious may have thought otherwise. Therefore, sentences do vary. This court will not willy-nilly interfere and substitute its own sentence for the one imposed by the trial court.

[56] In our judgement, it has not been demonstrated that the learned trial judge had breached any of the guiding principles of sentencing and neither has it been shown that the sentence imposed is wrong in law. The sentence is also neither manifestly inadequate nor is it manifestly excessive in the circumstances of the case.

[57] We further find no merit in the submission that the sentence between the two appellants ought to have been the same. While it may be true that liability under s. 34 of the Penal Code is equal, the learned trial judge was perfectly entitled to impose different sentences having considered the facts and circumstances of the case and the mitigating factors that has been put forward before him.

[58] There is no exact mathematical formula for the imposition of sentence and standardisation of sentence is something which should not be adopted as a rule of thumb. As succinctly put by Yong Pung How CJ Singapore in *Seong Hee Sin v. Public Prosecutor* [2001] 2 SLR 253:

> any attempt to reduce the law of sentencing into a rigid and inflexible mathematical formula in which all sentences are deemed capable of being tabulated with absolute scientific precision will be highly unrealistic …

[59] Again we find no reason to interfere with the sentence imposed and for the aforesaid reasons, the Public Prosecutor's appeal against sentence is hereby dismissed.

[60] In conclusion, these two appeals are hereby dismissed and the conviction and sentence imposed by the learned trial judge is affirmed.